

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,567

NOEL D. EURESTI,

Appellant,

v.

THE WASHINGTON TERMINAL COMPANY,

Appellee.

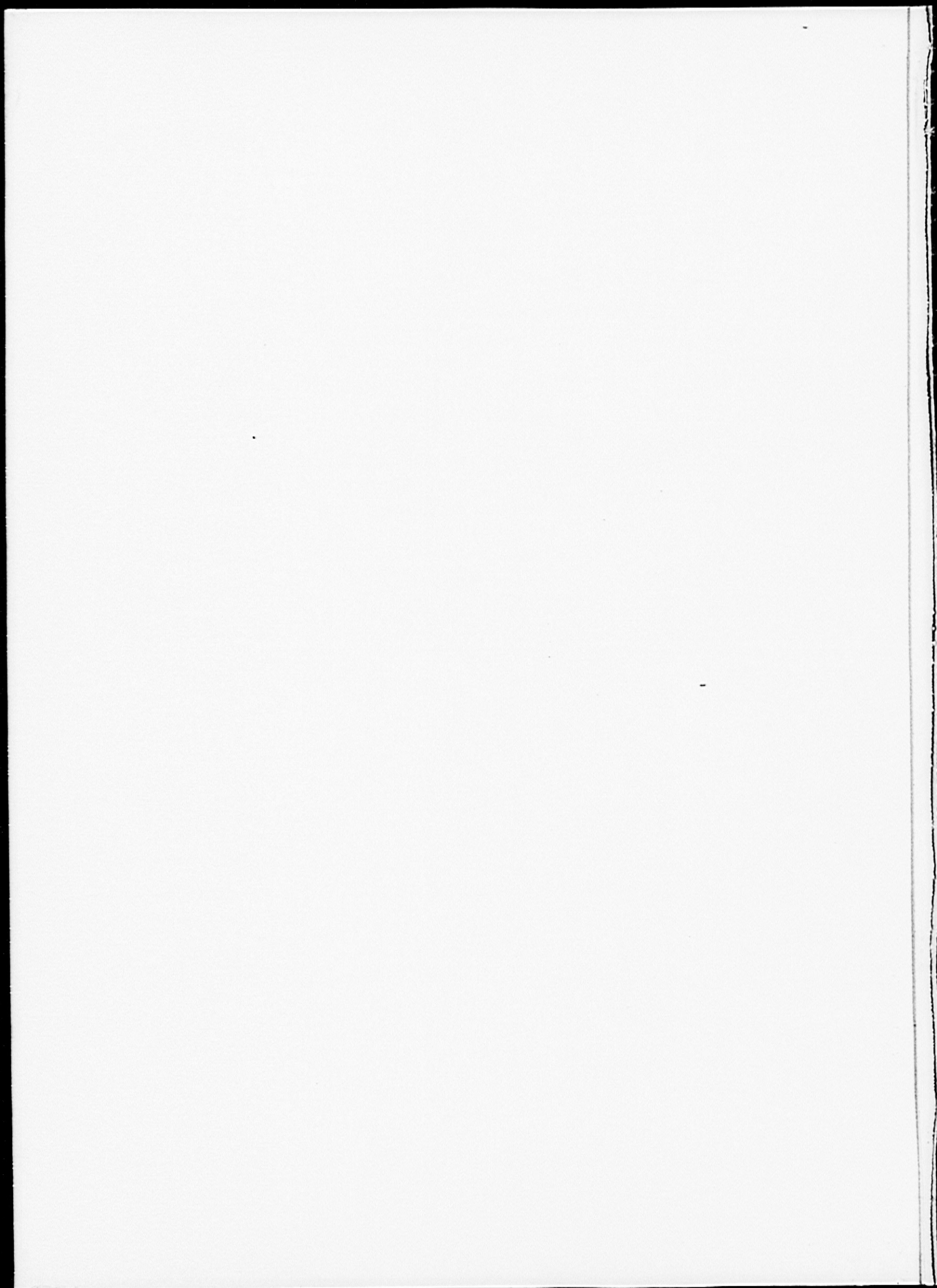
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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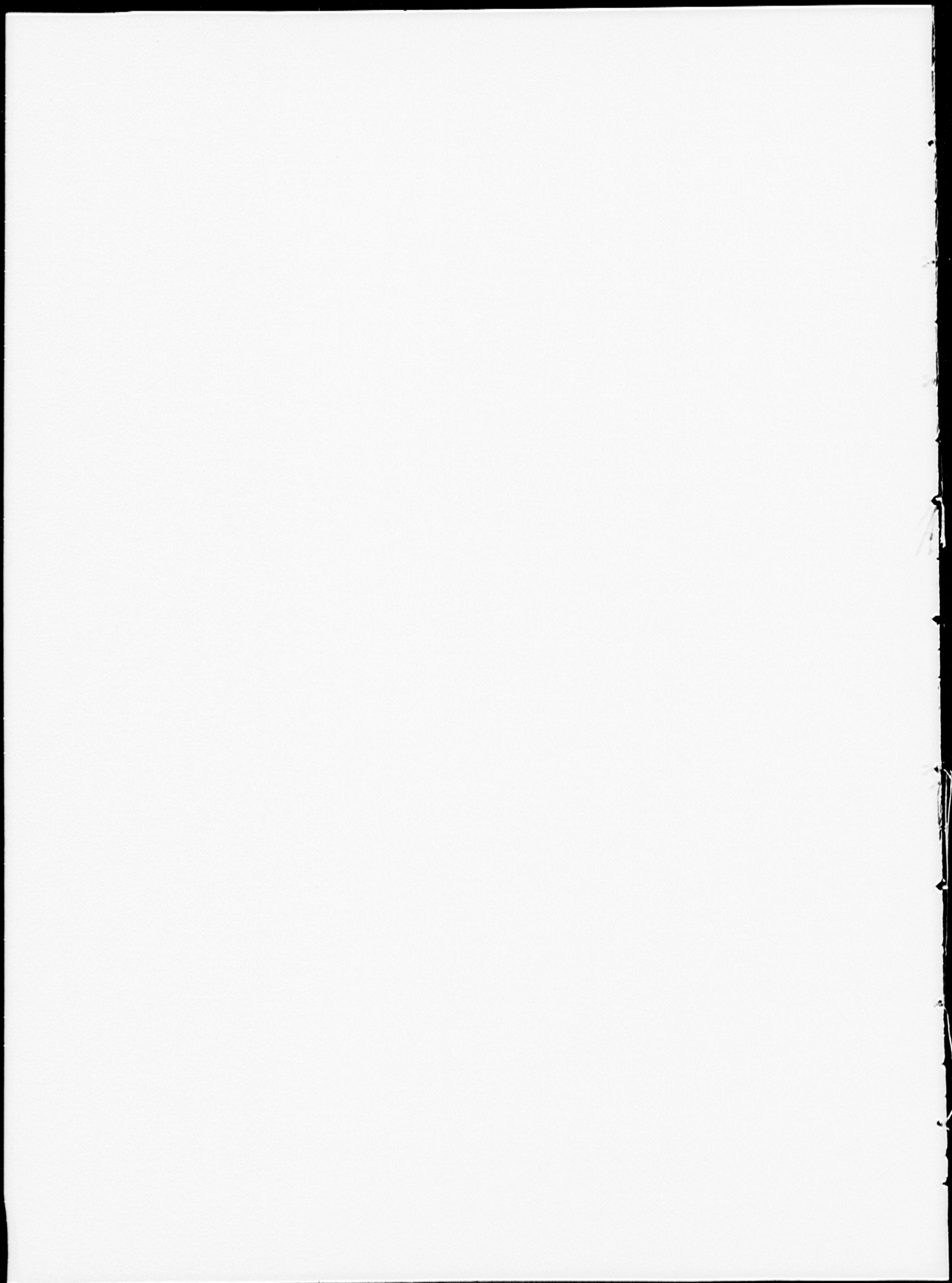


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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellant the questions presented are:

1. Whether the employee's opening statement in an action against his employer brought under the Federal Employers' Liability Act for injuries sustained through an assault by a fellow employee was sufficient to allege that the negligence of the employer played any part in producing the injury.
2. Whether the allegations of the opening statement were sufficient from which the jury could find or reasonably infer that negligence of the employer played any part, even the slightest, in producing the injury for which damages are sought under the Federal Employers' Liability Act so as to preclude the granting of a motion for a directed verdict at the conclusion of the opening statement.
3. Whether the employee's opening statement in an action against his employer under the Federal Employers' Liability Act for injuries sustained through an assault by a fellow employee was sufficient from which a jury could draw an inference that the assault was an outgrowth of the employment.
4. Whether an assault committed by a fellow employee concerning enforcement of the employer's rules may be regarded as having been committed within the scope of the employment or in furtherance of the employer's business.
5. Whether an assault which is the outgrowth of a work matter may be considered as being within the scope of the employment or in furtherance of the employer's business.

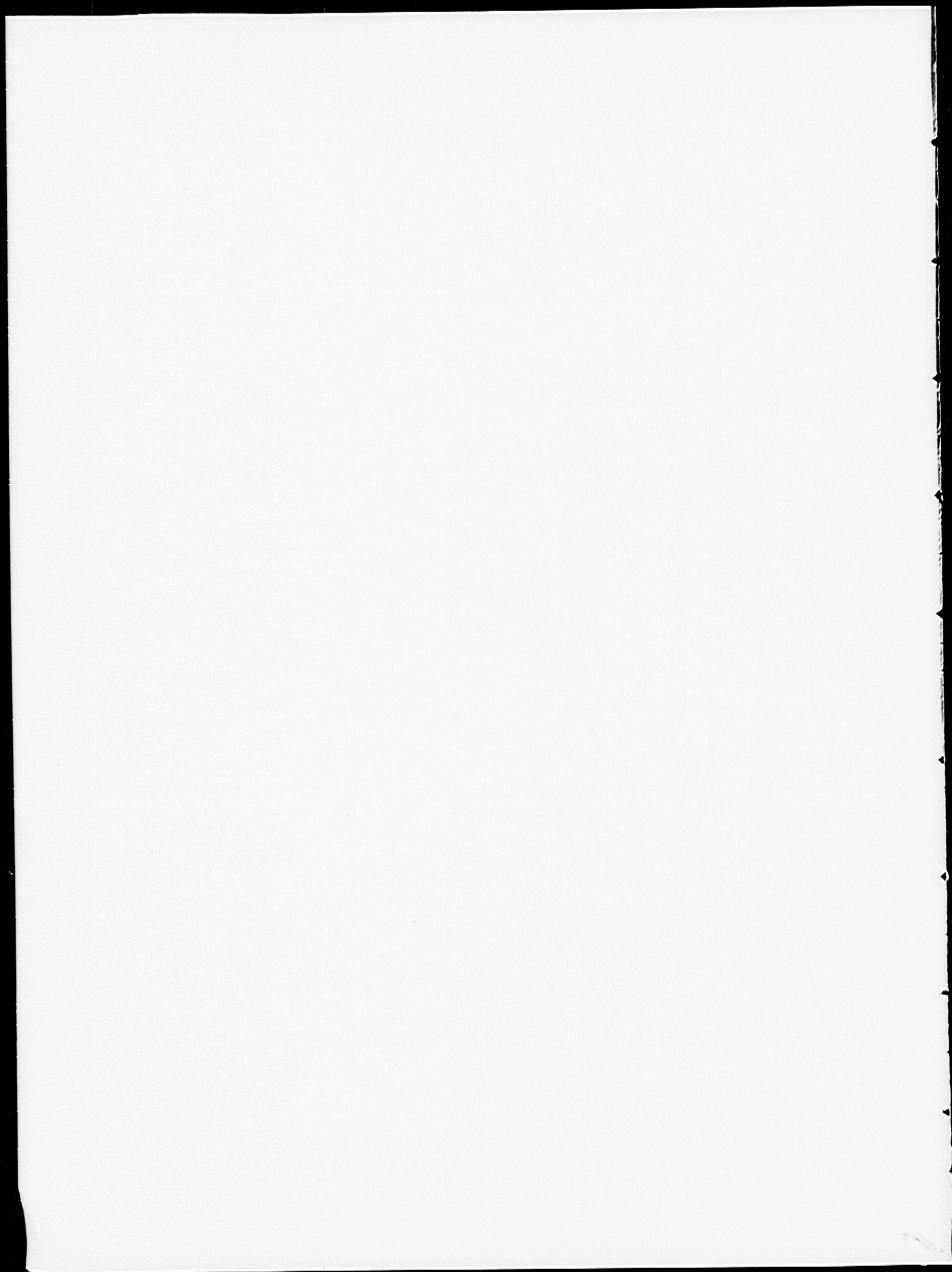


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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 15,567

NOEL D. EURESTI,

Appellant,

v.

THE WASHINGTON TERMINAL COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Noel D. Euresti from the action of the trial court in granting a directed verdict for the defendant The Washington Terminal Company at the conclusion of the opening statement of counsel for plaintiff. Jurisdiction of this Court to review this case is based upon Section 1291 of Title 28, United States Code.

STATEMENT OF THE CASE

The case was called for trial and upon completion of the opening statement of counsel for plaintiff, in which he set forth the facts he expected to be able to prove, the Court granted the defendant's motion for a directed verdict.

The opening statement represented that the plaintiff would prove the following facts: On September 11, 1957, plaintiff was employed as a crew clerk by the defendant; his tour of duty was from 4:00 p.m. to midnight; among his duties was the making of job assignments, including the assignment of a yard clerk, and to be sure that the crews for the tour of duty commencing at midnight were complete so that the railroads would function properly; in performing this job the plaintiff was required to follow the regulations of defendant; defendant prepared a list on Monday of each week containing the names of persons to be assigned to fill vacancies during the ensuing week; there were two such names on the list of the persons available for the job of crew clerk or yard clerk and these persons were a Mr. Ryan and Mr. Burdsall; that under the rules of defendant on Monday of each week the said Ryan was at the head of the list and was the number one or senior man to be assigned to the next available vacancy; once he was assigned for an 8 hour tour of duty, then Burdsall automatically became the number one or senior man for the next vacancy, until both of them completed a five day work week; when plaintiff reported to work on Wednesday, September 11, 1957 at 4:00 p.m., he was informed by the crew clerk he was then relieving that there was one job assignment as yard clerk still vacant for 5:00 p.m. and that Burdsall who was at the head of the list and entitled to fill that vacancy under the rules of the company had not yet reported into the office as he was required to do, but that Mr. Ryan, the number two man on the list for that day had telephoned concerning the vacancy; plaintiff was requested by Hughes to wait until 4:30 before making the assignment, and to give the assignment to Ryan if Burdsall had not yet contacted the office; that plaintiff not having heard from Burdsall made the assignment to Ryan at 5:00 p.m. About

seven minutes later when Burdsall telephoned plaintiff concerning his job assignment, he was informed by plaintiff that he had given the assignment to Ryan. The opening statement further charged that plaintiff explained to Burdsall that he had assigned the job to Ryan, the number two man, because he had not heard from Burdsall and he had no other choice; Burdsall then remonstrated with plaintiff and a bitter argument developed on the telephone concerning the violation of Burdsall's rights and that under the rules of the defendant, he, Burdsall, was the number one man on the defendant's list and was entitled to that job assignment; that this conversation went on for some time and revolved around the right of Burdsall under the rules of the defendant to fill that job assignment and plaintiff's violation of the rules of the company by giving the job assignment to the number two man; that Burdsall hung up the telephone very mad. Plaintiff was sitting at his regular desk performing his job when the door to the office opened about 45 minutes after the telephone conversation was concluded, and Burdsall walked into the office roaring mad, walked up to the plaintiff, grabbed him and giving him a punch in the face, threw him over the chair causing him to sustain serious injury. Burdsall was an amateur boxer and person of violent temper and that this is known to the defendant; that Burdsall is still in the employ of the defendant but that today his name is the only one on the list. The opening statement further charged that the evidence would show that the attack was committed in the scope of the employment.

STATUTE INVOLVED

The Statute involved is 45 U.S.C. Sects. 51-60 known as the Federal Employers' Liability Act. Sect. 51 of the Act provides:

"Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

STATEMENT OF POINTS

1. The Court erred in granting defendant's motion for a directed verdict upon completion of the opening statement of counsel for plaintiff.
2. The Court erred in holding that the opening statement of counsel for plaintiff did not state a cause of action.
3. The Court erred in failing to hold that the plaintiff's opening statement stated a case of liability against the defendant.
4. The Court erred in failing to hold that the plaintiff's opening statement was sufficient to require for jury resolution the issue of the liability of the defendant.
5. The Court erred in failing to hold that the plaintiff's opening statement was sufficient to require the jury to determine whether the assault was committed within the scope of the employment.

SUMMARY OF ARGUMENT

I

The opening statement was sufficient to require the court to leave for jury resolution the issue as to whether the fault of the employer played any part at all in the injury of the plaintiff. If the assault was the outgrowth of the argument over defendant's regulations then it must be considered as being within the scope of the employment.

II

If the assault can reasonably be attributed in whole or in part to the nature, conditions, obligations or incidents of the employment then it should be regarded as a work-induced assault so as to support a finding that it was committed within the scope of the employment. The test to be applied in an assault case under the Federal Employers' Liability Act is whether the assault arose out of a work matter.

ARGUMENT

ASSAULT WHICH OCCURS AS RESULT OF ARGUMENT PERTAINING TO ADMINISTRATION OR ENFORCEMENT OF CARRIER'S REGULATIONS IS WITHIN SCOPE OF EMPLOYMENT AND IN FURTHERANCE OF EMPLOYER'S BUSINESS

The precise question is whether the opening statement was sufficient to make out a jury case under the Federal Employers' Liability Act. The Act provides that the carrier is liable for an employee's injury "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." The term "negligence" embraces a willful assault and battery committed by a fellow employee. Jamison v. Encarnacion, 281 U.S. 635 (1930); Alpha S. S. Corp. v. Cain, 281 U.S. 642 (1930).

The trial court in the instant case held that there was no connection between the attack and the argument on the telephone concerning the rules of the defendant and accordingly concluded as a matter of law that the assault was committed to satisfy a personal grievance. We submit that the opening statement contained ample support for a jury finding that the assault was the outgrowth of the telephone argument concerning defendant's rules and was therefore within the scope of the employment and in furtherance of the defendant's business. The ultimate question therefore is whether a dispute between two employees concerning the administration, enforcement or interpretation of the employer's regulations may be considered in furtherance of the employer's business. In the case of Gibson v. Kennedy, 23 N.J. 150, 128 A.2nd 480 (1957) an action brought under the Act, it was held that an assault committed in an attempt to secure compliance with the carrier's regulations was in furtherance of the carrier's business.

If the argument concerning the defendant's rules played any part, even the slightest in producing the injury, then the present case falls within the test stated by this court in the case of Spann v. Richmond, Fredericksburg and Potomac Railroad Co., ___ U.S. App. D.C. ___, 273 F.2nd 827 (decided December 23, 1959). The trial court apparently took the view that since the assault took place some 45 minutes after the telephone argument, then there was no connection between that conversation and the assault. We state that this was in error since if the assault could reasonably be attributed in all or in part to the telephone argument, then it was within the scope of the employment. If fault of the employer in the issuance, administration, enforcement or interpretation of the regulations played any part in the plaintiff's injury, then the plaintiff may recover for his injuries. Whether there was such fault was a jury issue. Furthermore, if there was any uncertainty as to whether the assault was an outgrowth of the telephone argument, then the jury is the tribunal to determine that fact. Merely because the assault was committed some 45 minutes after the telephone conversation was not sufficient to hold as a matter of law that it was disconnected from the verbal argument on the telephone.

REQUIREMENTS OF THE ACT SATISFIED IF THE ASSAULT WAS
ENGENDERED BY THE EMPLOYMENT OR AROSE OUT OF A WORK MATTER

We state that it was the intention of Congress in enacting the Federal Employers' Liability Act to abolish the common law concepts of liability and to substitute a statutory rule. Thus, in the case of Rogers v. Missouri Pacific Railroad, 352 U.S. 500, 507 the court said:

"The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than

the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

* * *

"Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. * * *

"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to the integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

The trial Court erroneously applied a common-law concept of liability which is inconsistent with the purpose of the Act. This same misconception was followed in the early workmen's compensation cases in determining whether an injury caused by the assault of a co-employee was one "arising out of" and "in the course of" the employment. The early cases adopted the common-law rule and did not permit recovery in such cases. In time, however, the primary question became whether there was a work-induced assault or a personal assault so that today, if the assault can reasonably be attributed in whole or in part to the nature, conditions, obligations or incidents of the employment, it is regarded as a work-induced assault, not as a personal matter. One of the earlier cases which established the modern trend of decisions was that of

Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 7, 11 (1920). In that case, the New York Court of Appeals in a decision written by Judge Cardozo held that an employee could recover if the assault was engendered by the employment or by the conditions of the employment. This Court in the case of Hartford Accident and Indemnity Co. v. Cardillo, 72 App. D.C. 52, 112 Fed. 2d, 11 followed this same general trend by allowing compensation when an employee was assaulted by a fellow employee over the work. This Court stated:

"The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i.e., non-culpable, but injurious) behavior was not difficult. So with that of strangers, including assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences."

Application of the above principals to the present case compels the conclusion that there were sufficient facts from which the jury could find that the assault was engendered by the employment. Not only did the argument leading to the injury arise solely over the performance of the assailant's duties, but his entire association with the plaintiff arose out of his employment under conditions and regulations imposed by the defendant itself. It was clearly the conditions of the employment and the administration of the employer's regulations which resulted in an argument and the ensuing attack. It is not necessary that the assault should have been made as a means, or for the purpose of performing the work the assailant was hired to perform. It is sufficient if one of the purposes of the assault was to further the interests of the defendant by seeking to secure compliance with the regulations.

CONCLUSION

We urge that this court follow the present liberal trend of the cases under the Federal Employers' Liability Act and of the assault compensation cases. This would be entirely consistent with the doctrine of the Rogers case, supra, which looks with disfavor upon a narrow construction of the Act and requires that common-law concepts be abolished in interpreting the Act. The court should at least leave to the jury the question of whether the servant acted within the scope of his employment or in furtherance of the employer's business. If the argument leading to the assault arose over the performance of the assailant's duties; and if the assault arose out of the conditions and regulations imposed by the defendant; and if the employment created the relationship and conditions which caused the argument and the ensuing attack, then the plaintiff should be allowed a recovery.

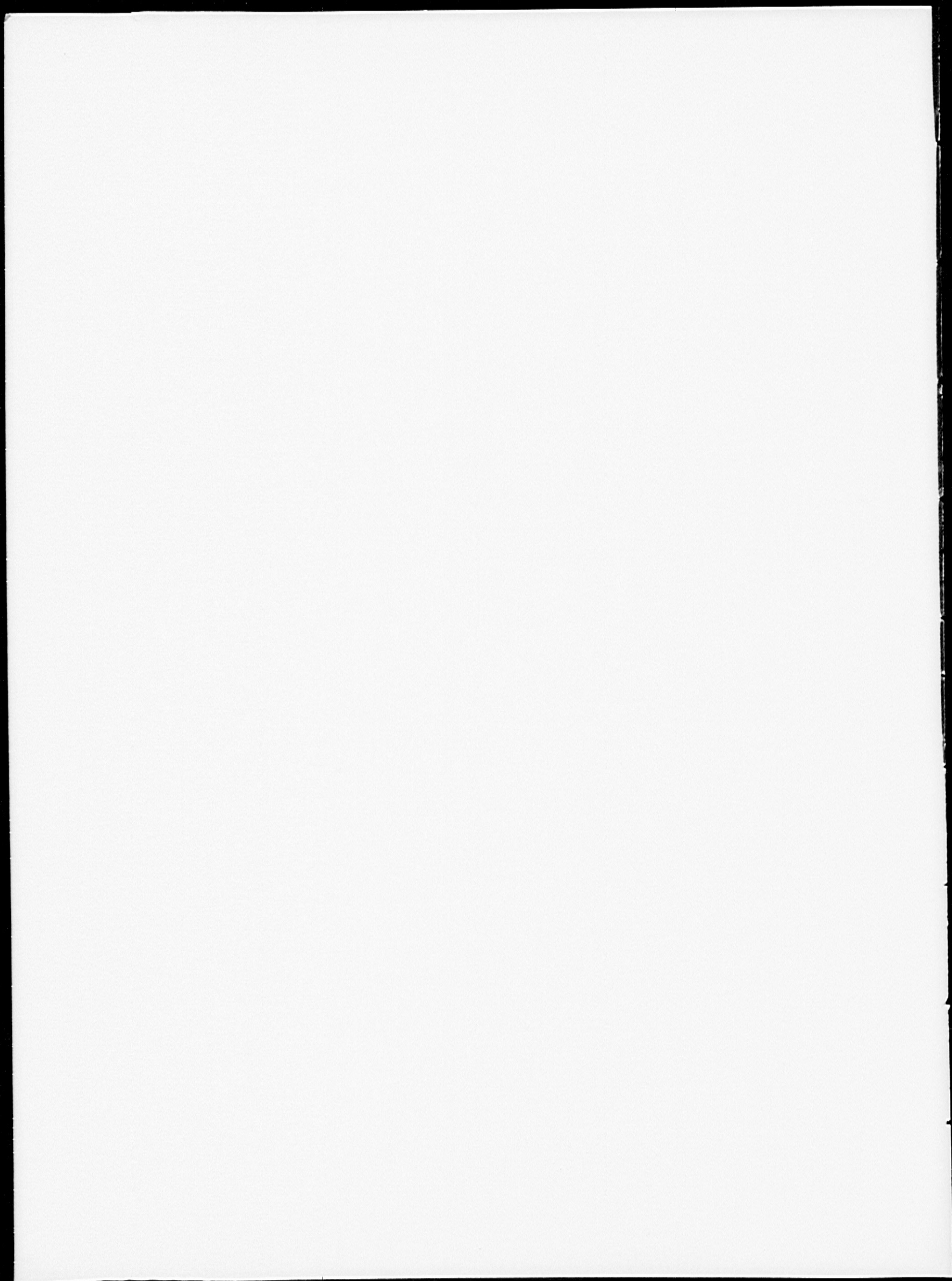
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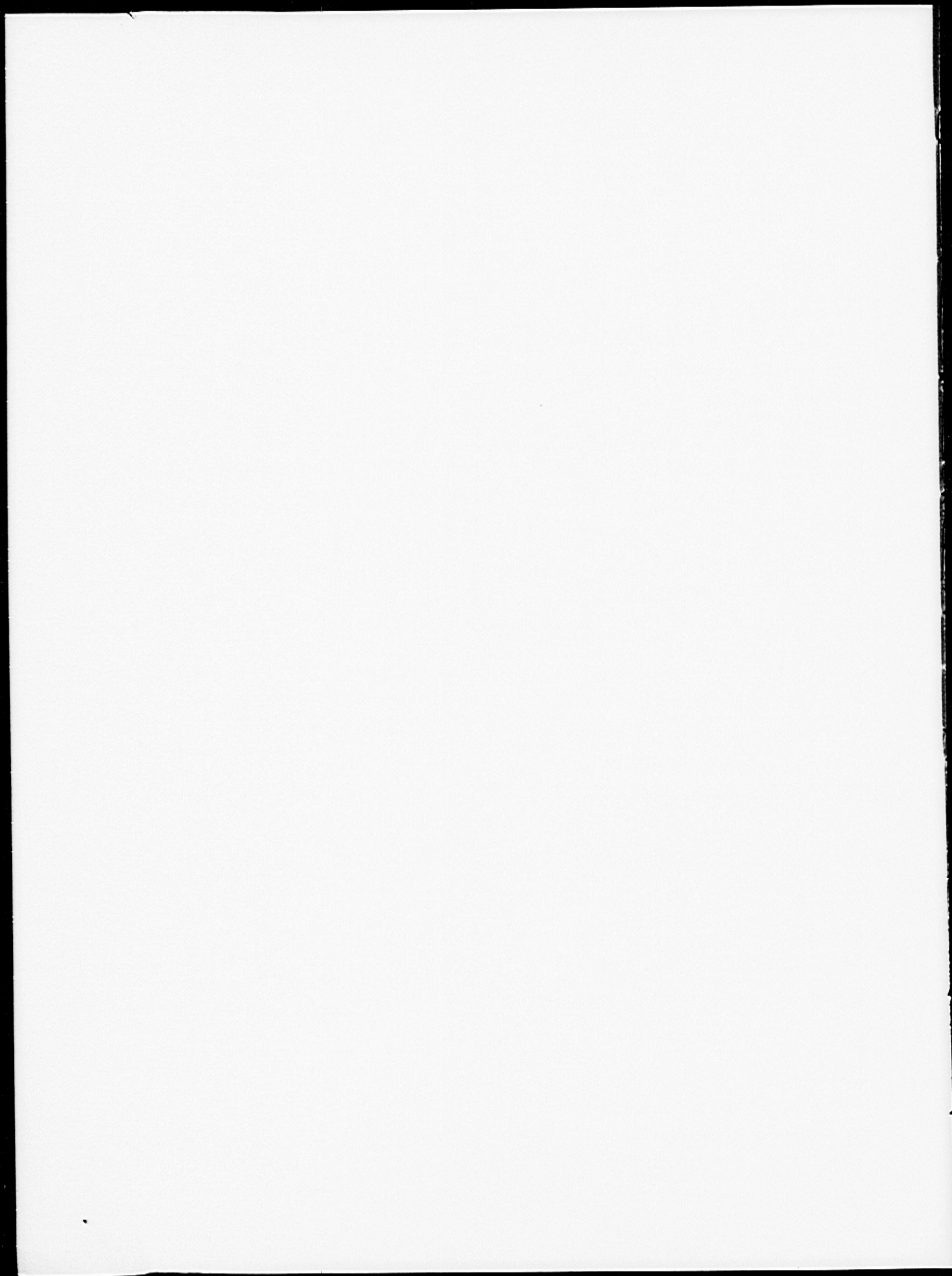
Attorneys for Appellant



(i)

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOEL D. EURESTI,

Plaintiff,

vs.

THE WASHINGTON TERMINAL COMPANY
a corporation,

Defendant.

Civil Action
No. 2263-58

[Filed September 4, 1958]

COMPLAINT FOR NEGLIGENCE

(Damages Sustained by Plaintiff While Employed by Defendant)

1. This action arises under the Federal Employer's Liability Act, 45 U.S.C.A., Section 51 et seq., and under general principles of negligence, as hereinafter more fully appears.

2. During all the times herein mentioned defendant, the Washington Terminal Company, a corporation, owned and operated in interstate commerce a railroad. The plaintiff, Noel D. Euresti, and numerous other persons were employed by the defendant in the conduct of its said business.

3. It was the duty of the defendant to exercise reasonable care in the selection of employees and to limit such selection to persons that possessed qualifications, mental, moral and physical, which would enable them to perform their duties without exposing fellow employees to greater dangers than the work necessarily entailed and without exposing its employees to an unreasonable risk of harm from fellow employees.

4. Notwithstanding its duty in the premises, the defendant negligently employed and negligently retained in its employment one Lloyd E. Burdsall, who did not possess the qualifications or temperament required in such employment and who possessed such

characteristics as to constitute a danger to his fellow employees, all of which was known or should have been known to the defendant.

5. On September 11, 1957, while the plaintiff was engaged in performing his regular duties for the defendant, the said Lloyd E. Burdsall seized the plaintiff and struck him a violent blow in his mouth and face with his clenched fist causing the plaintiff to fall with his chair to the ground and to sustain serious and numerous injuries in and about his head, face, mouth, body and limbs and he sustained a severe concussion to his head and a permanent injury to his back and has suffered great physical and mental pain, and that as a result of said injuries the plaintiff was confined to the hospital and his home for a great length of time with resultant loss of earnings and he required hospital and medical treatment and attendance and he will in the future continue to suffer physical and mental pain and require medical attendance, all to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00).

WHEREFORE, the plaintiff Noel D. Euresi sues the defendant, The Washington Terminal Company, a corporation, and claims from it the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) besides the cost of this suit.

/s/ Morris Benson
Washington Building, Wash., D.C.

/s/ I. Irwin Bolotin
***, Washington, D. C.

Attorneys for the Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

/s/ I. Irwin Bolotin
Attorney for the Plaintiff

[Filed September 23, 1958]

ANSWER OF DEFENDANT
THE WASHINGTON TERMINAL COMPANY

Comes now the defendant, The Washington Terminal Company, and through its attorney answers the complaint filed herein as follows:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The defendant answers the numbered paragraphs of the complaint as follows:

1. The defendant admits that this action arises under the Federal Employees' Liability Act, 45 U.S.C.A., section 51, et seq., and general principles of negligence insofar as they are pertinent to said act; the defendant denies that this action arises under principles of common law negligence.

2. The defendant admits all allegations contained in Paragraph SECOND.

3. The allegations in Paragraph THIRD constitute conclusions of law, and as such, the defendant is not required to make answer to them; however, to the extent that an answer is required all allegations contained in Paragraph THIRD are denied.

4. The defendant denies all allegations contained in Paragraph FOURTH.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph FIFTH.

5. The defendant denies that the plaintiff is entitled to the amount claimed or to any part thereof.

Third and Affirmative Defense

Defendant alleges that the injuries and damages, if any, suffered by the plaintiff were caused by contributory negligence of the plaintiff.

WHEREFORE, the premises considered, this defendant prays
that the complaint be dismissed with costs.

HAMILTON AND HAMILTON

By /s/ Roman J. Gerber

/s/ Wm. B. Jones by RJG

Attorneys for Defendant, THE WASH-
INGTON TERMINAL COMPANY ***

[Certificate of Service]

[Filed January 19, 1960]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.

Monday, November 16, 1959

* * * *

2

THE COURT: Plaintiff's opening statement.

MR. BOLOTIN: May I proceed, your Honor?

THE COURT: You may proceed.

MR. BOLOTIN: Thank you.

Members of the jury: As I mentioned a few moments ago, I
represent the plaintiff, Noel D. Euresi. On September 11th--the
evidence will show, on September 11th, 1957, and approximately
three or four years prior to that date, Mr. Euresi was employed by
the defendant, the Washington Terminal Company; that he was desig-
nated as a crew clerk, and that he had a certain fixed hours of em-
ployment, being from 4:00 p.m. to midnight.

The evidence will show you that the Washington Terminal
Company--and I'm sure all of you know who I am talking about--that's
Union Station, that's part of the Washington Terminal Company.

That company employs a large number of people, clerks,
trainmen, yard masters, station masters--a large variety of employees.
That they operate 24 hours, around the clock, on the basis of three
eight-hour shifts, 8:00 a.m. to 4:00 p.m. is the first tour--they call it

a trip, it's a first tour; 4:00 p. m. to midnight is the second tour; and midnight to 8:00 a. m. is the third tour.

- 3 Mr. Euresti's duties with this company have been about the same, and they still are the same. He is still working at the same job that he was working on September 11, 1957, when this incident took place.

Being a crew clerk, his job from 4:00 to midnight was to make sure that crews for the shift beginning at midnight, the next shift, were lined up, assembled, and would report for duty so that the function of the railroads would go on--there would be no shortage of men.

He'd have to take a list, find out what vacancies there were, who reported in sick, who was on leave on the mid-shift, the shift beginning at midnight, and while he was there from 4:00 to midnight, he had to make sure that extra help and other persons available for duty would be available to take over the jobs.

I mention that for this reason: The evidence will show you that under his jurisdiction was a job commonly known or called a temporary crew clerk or temporary yard clerk; that that was one of the particular jobs that he had to be sure was attended to on the midnight shift.

Mr. Euresti, in the performance of this work, had to follow a number of fixed rules and regulations which we know any large organization has to have to function properly. They have certain rules and regulations that have to be followed.

- 4 Mr. Euresti will tell you what those rules and regulations were insofar as this particular incident is concerned. Mr. Euresti will also tell you from the witness stand, and also other witnesses from the Washington Terminal Company, that there were three persons performing his particular job--that's on the three different shifts that I have mentioned.

That list is made up every day and Mr. Euresti gets a copy of that list showing the various jobs that have to be filled or where there are vacancies. And the job requires a certain amount of experience and tact and initiative which is very important in this job.

Insofar as the crew clerk job is concerned, and I emphasize crew clerk because we're not concerned today with his particular job in obtaining trainmen or brakemen--we are concerned only with the job of crew clerk. The evidence will show you at that time there were two so-called extra men available on this list, to serve either as crew clerk--that would be in the same office where he works, at the telephone primarily--or as a yard clerk, and that is out in the yards, in the station, as a clerk to the assistant yard master or yard master, whoever needed this particular clerk.

5 These two names were on that list as extras, meaning that under the rules of the company each one would work at least five days a week, and each one would be called to fill whatever--wherever there was a vacancy, either in Mr. Euresti's office or in the yard, in the order in which they appeared on the list, and that's where the list becomes important.

The two names were a Mr. Ryan and a Mr. Burdsall, Mr. Burdsall being the man who committed this assault. That under the rules of the company, every Monday when the fresh list was made out, Mr. Ryan was what they call either the head man or the senior man--you'll hear these stories from the witness stand--or the number one man, meaning that on Monday, the beginning of the work week, for the first vacancy that occurs, whether it's Monday, Tuesday or Wednesday, whenever the first vacancy occurred, Mr. Ryan would fill that vacancy on the eight-hour tour of duty.

Under the rules of the company, once a person works eight hours--a person in that category works eight hours--he cannot work again for the next sixteen hours, I think that's correct.

So that the person called to work serves his eight hours and that's his job--his job is done for the immediate. Then, in this particular instance, the number two man, in this case being Mr. Burdsall, becomes the number one man, meaning that the next opening that occurs, he's the one that is entitled to fill that opening.

6 Then, if he is called say on Tuesday or Wednesday, whenever

the opening occurs, Mr. Ryan again becomes the head man and the number one man. I hope I am not confusing you. I am trying to make it as clear as possible.

September 11, 1957 was on a Wednesday. On Monday of that week, as was the custom, Mr. Ryan was the head man, number one man on the list, and Mr. Burdsall was number two, and we will show such a list to the jury at the proper time.

On the sequence of events, Mr. Burdsall was the number one man on Wednesday, September 11, 1957. There is no dispute about that. That is admitted. Mr. Burdsall, on September 11, 1957, was the number one man entitled to fill any vacancy that occurred on that day, on Wednesday.

Mr. Euresti, of course, was familiar with the rules and regulations of the company because he was working with them for about four years prior to that date. He came to work at four o'clock on that Wednesday, September 11th.

The practice and the custom and the requirement of the company is that the man who he relieves--at that time it was a Mr. Hughes, who is still employed at the Terminal Company, and is under subpoena by us, as well as a number of other employees, to show you the sequence of these events that I am telling you about--Mr. Hughes was then working the daylight shift, that is, from 8:00 a.m. to 4:00 p.m.

7 Mr. Euresti reported to work and Mr. Hughes handed over whatever it was necessary, the document, the lists, and Mr. Hughes explained to Mr. Euresti that there were still one vacancy on the tour of duty that Mr. Hughes was supposed to fill, that is, the tour of duty which started 4:00 o'clock to midnight, not on the tour of duty that Mr. Euresti was supposed to fill. The tour of duty he had to fill was the following tour of duty.

Mr. Hughes explained to him that there was still one vacancy, that was the yard clerk's job that I mentioned to you before, that Ryan would be called for or Mr. Burdsall would be called for. But Mr. Hughes explained to Mr. Euresti that--or Mr. Euresti knew from

the list that Mr. Burdsall was entitled by seniority or being at the head of the list to have that job.

But Mr. Hughes explained to Mr. Euresti that he hadn't heard from Mr. Burdsall all that day and he was supposed to call in by two or two-thirty o'clock to confirm the fact that he was going to work on that shift, and Mr. Hughes was very concerned about the fact that he hadn't filled that job that he was supposed to fill, and he asked Mr. Euresti to wait until about four or four-thirty because it would be-- the company had no objection if that particular person came to work a little late, five o'clock--four-thirty to five--there was no big problem involved.

8 So Mr. Hughes asked Mr. Euresti to hold up filling that vacancy with the number two man, Mr. Ryan, who had already called in to find out if he could fill that job--called in once or twice--not to fill the vacancy, but to wait until four or four-thirty to give Mr. Burdsall a chance to 'phone.

He had been trying to get him all afternoon and couldn't locate him. Mr. Ryan--this is the man who is not involved in the assault--Mr. Ryan did telephone, and he telephoned twice, I think the evidence will show, between four and five.

And Mr. Euresti, not having heard from Mr. Burdsall, he assigned--that was his prerogative--that was his specialty--he assigned the number two man to the job, Mr. Ryan.

Seven minutes later Mr. Burdsall called. This was sometime after 5:00 o'clock. He's supposed to call by two-thirty. He called after 5:00 o'clock and asked Mr. Euresti what assignment he had given to Mr. Burdsall.

Mr. Euresti explained to him what had happened and that he had assigned the job to the number two man who was probably out there working already, and he did it because of the logic that not knowing that the man would come to work, or not having called in to report that he could come to work, he had no other choice.

Then this bitter argument developed on the telephone

9 concerning the violation of Mr. Burdsall's rights; he made certain accusations and remonstrations to Mr. Euresti, that under the rules of the company he was number one man and he was entitled to that job, and the conversation went on for some time, and the entire conversation revolved around his rights under the rules to fill that job, and Mr. Euresti's violation of the rights of the rules of the company to give the job to the number two man.

Then Mr. Euresti said to him, "Well, I'm sorry." And Mr. Burdsall said, "If you won't let me work that job," or words to that effect, "then let me come in and work at your desk as an extra in your office," and Mr. Euresti told him that he couldn't assign him to that job because he didn't need any extra help and that he was using his discretion again, that he explained to him that there was no need for extra help in the office--he didn't need anybody, and that the only opening that had been available was a yard clerk to assist the assistant yard master, and he already assigned Mr. Ryan to that job and Mr. Burdsall hung up on him, very mad.

And then Mr. Euresti turned around to perform the rest of his job. He had eight hours to line up his crews for the next tour of duty. And he was sitting at his regular desk with another employee, a Mr. Howe, whose name I mentioned before, and who is also under subpoena.

10 They were discussing the job vacancies and discussing just what their procedure should be when the door opened--this is about forty-five minutes after the telephone call--the door opened, Mr. Burdsall walked in roaring mad, walked up to the plaintiff, grabbed him and gave him a punch in the face, threw him over the chair, causing fairly serious injuries.

He has a permanent scar on his lip; his whole face was bloody. It was a powerful punch, the evidence will show. He had been taken to the hospital, Casualty Hospital, and came under the care of Doctor Young.

He was in the hospital for a number of days and as a result of

this injury was out of work for approximately one month.

The evidence will show that this man Burdsall is an amateur boxer. He has a violent temper, and, of course, the company knows all this, and he is still employed today, but today his name is the only name on the list. I think Mr. Ryan has left, so the only man on that list now is Mr. Burdsall; he's still employed by the company.

Mr. Euresti will describe to you as best he can how he felt, what his injuries were, and this course of recovery and what, if anything, is bothering him today.

Now, as Mr. Gerber and I both told you, this is not the ordinary negligence case that you may have been sitting on. This is brought under what I mentioned, the F.E.L.A., the Federal Employer's Liability Act, which is a special Act of Congress
11 only for railroad companies engaged in Inter-State Commerce, and the Judge will tell you at the proper time that the Washington Terminal Company is included in that definition. There is no dispute about that.

As Mr. Gerber explained to you, some of you are probably familiar with the Workmen's Compensation Act and know that usually when people are hurt while at work they're automatically covered for the time they lose and injuries under applicable Workmen's Compensation Laws.

So, as we both told you, as far as railroads are concerned, there is no Workmen's Compensation Act. The only remedy that Congress saw fit to give to railroad employees, which includes Mr. Euresti--he's a railroad employee--was the remedy under this Act.

The Act provides, as we both told you, that first a person has to be injured while at work. There is no dispute there. The injury must be caused in whole or in part on the part of the officers, employees, or agents of the railroad carriers, the railroad company, or in this case the Washington Terminal Company.

Negligence, as interpreted by the Courts, includes the wilfull assault and battery--

* * * *

12 Well, the evidence will show that this assault was committed within the scope of Burdsall's employment as the Court will define that to you under the instructions that counsel will request be read to you.

Once we show these facts that I have mentioned to you, we trust that you will give the plaintiff such an amount that is reasonable and considering the injury and expenses he sustained.

Thank you.

* * * *

[Filed February 1, 1960]

1

Washington, D. C.

Monday, November 16, 1959

* * * *

19 MR. GERBER: Your Honor, on the basis of the opening statement, I would like to make a motion for directed verdict.

* * * *

The plaintiff's counsel, in his opening statement, has simply said in reference to that assault that he burst through the door and hit the plaintiff--nothing more to establish that this was in any way within the scope of his employment.

* * * *

23 MR. GERBER: That's correct, your Honor. The second
24 theory which is set out in the plaintiff's complaint; the second theory which is where the plaintiff is attempting recovery, is that the Washington Terminal Company was negligent in hiring Burdsall and/or it was negligent in retaining Burdsall in its employment, and the net result of this negligence in this hiring and/or retaining Burdsall in employment was to give the plaintiff an unsafe place in which to work.

* * * *

There is no statement in that--there is no statement of facts in that opening statement that says the Terminal Company had knowledge prior to the time of this accident that Burdsall was the man that had a

tendency to go around striking people; that he was a dangerous man; that he was vicious.

* * * *

There was no mention in the opening statement of the plaintiff's counsel that the Terminal Company was negligent in its investigation
25 of Burdsall at the time he was employed. That there was, at the time he was taken in the employment by the Terminal Company, certain things that should have been known in his background and should have been known by an investigation made by a prospective employer; that there was no mention of that.

There was no mention that there were any incidents or that it was reasonable to believe after the man was hired that should have put the defendant on notice that this man was a dangerous person and therefore his presence gave the plaintiff an unsafe place in which to work.

* * * *

40 THE COURT: Well, a very serious objection has been made to that opening statement, and I think that it would be quite reasonable and rational to state that the man who assaulted the plaintiff was mad; mad because he couldn't go on shift. And he got so mad that he went over there and punched him on the nose.

Now I can't see for the life of me how that was done in any respect with respect to the furtherance of his employer's business. It seems to me he just got mad and went over and said, "Well, I'll take it out of your hide," and he punched him in the nose.

41 Those things are occurring with great regularity all over the world; and because of that, the Court is going to grant the motion.

* * * *

43 THE COURT: Well, I should think that there would be an allegation of the fact that caused this man to be unfit. There is nothing in your opening statement concerning that.

44 MR. BOLOTIN: No, Your Honor. I said I am addressing myself just to the respondeat superior on this theory. We didn't intend

to go beyond that.

But the Court points out that the expressions of human nature are incidents inseparable from working together. The mere bringing of people together involves risks, and these risks are inherent in the working environment. So it was the working environment that caused this assault, and not personal motive.

THE COURT: I don't believe that is the way I view it, that there is no connection at all between that punch in the nose and the quarrel over the 'phone with respect to the rules.

He couldn't work that night; he got mighty good and mad; he opened the door and hit him in the nose. It seems to me that's the venting of personal spite, anger, emotion.

For that reason, I am granting the motion.

Bring in the jury.

(Jury returned to Court room.)

THE COURT: Ladies and gentlemen of the jury, the Court advises you that you are dismissed from any further consideration of this case for the reason that the Court has dismissed it as a matter of law.

* * * *

[Filed November 24, 1959]

MOTION FOR NEW TRIAL

COMES NOW the plaintiff, Noel D. Euresi, and by his attorneys moves the Court for a new trial in this case and for grounds therefor states as follows:

1. The Court erred in directing a verdict for the defendant at the conclusion of the plaintiff's opening statement.

Respectfully submitted,

/s/ I. Irwin Bolotin
/s/ Philip J. Lesser ***
/s/ Morris Benson ***
Attorneys for Plaintiff

DENIED
Dec. 14, 1959
/s/ Jackson, J.

[Filed December 14, 1959]

ORDER OVERRULING MOTION FOR NEW TRIAL

Upon consideration of the motion filed hereby by Plaintiff, for a new trial, it is this 14th day of December, 1959, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, Clerk

By /s/ John G. Thomas
Deputy Clerk

By direction of
Joseph R. Jackson
JUDGE

[Filed January 8, 1960]

NOTICE OF APPEAL

Notice is hereby given this 8th day of January, 1960, that Noel D. Euresti hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of December, 1959 in favor of The Washington Terminal Company against said Noel D. Euresti.

/s/ I. Irwin Bolotin
Attorney for Plaintiff

[Filed January 25, 1960]

STATEMENT OF POINTS

Comes now the plaintiff by and through his attorneys, I. Irwin Bolotin and Philip J. Lesser, and submits the following as the only points upon which he will rely on an appeal:

1. The Court erred in granting defendant's motion for a directed verdict upon completion of the opening statement of counsel for plaintiff.
2. The Court erred in holding that the opening statement of counsel for plaintiff did not state a cause of action.
3. The Court erred in failing to hold that the plaintiff's

opening statement stated a case of liability against the defendant.

4. The Court erred in failing to hold that the plaintiff's opening statement was sufficient to require for jury resolution the issue of the liability of the defendant.

5. The Court erred in failing to hold that the plaintiff's opening statement was sufficient to require the jury to determine whether the assault was committed within the scope of the employment.

Respectfully submitted,

/s/ I. Irwin Bolotin

/s/ Philip J. Lesser ***

Attorneys for Plaintiff

[Certificate of Service]

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,567

NOEL D. EURESTI, *Appellant*

v.

THE WASHINGTON TERMINAL COMPANY, a corporation,
Appellee

**Appeal from Judgment of the United States District Court for
the District of Columbia Entered in Favor of Appellee on
Appellee's Motion for Directed Verdict**

ROMAN J. GERBER,
Union Trust Building,
Washington, D. C.

WILLIAM B. JONES,
Union Trust Building,
Washington, D. C.

Counsel for Appellee

Of Counsel:

HAMILTON AND HAMILTON

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

*United States Court of Appeals
For the
District of Columbia Circuit*

APR 19 1960

Joseph W. Stewart

CLERK

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Counsel for Appellee

Of Counsel:

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

United States Court of Appeals

For the

District of Columbia Circuit

APR 19 1960

Joseph W. Stewart

CLERK

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee the question presented is:

Whether appellant's opening statement, which alleged that, after the appellant crew clerk had out of necessity assigned one extra clerk to fill a job vacancy, Burdsall, another extra clerk employee of appellee, made a belated telephone call to claim this vacancy when he was advised by appellant that the vacancy was filled, engaged the appellant in a bitter argument concerning a violation of his (Burdsall's) rights under the appellee's rules to fill the job, demanded that he be allowed to immediately work as an extra employee in some other job where he was not needed, angrily hung up the telephone when his demand was refused, and about forty-five minutes after the telephone call walked into appellant's office "roaring mad" and assaulted appellant, set forth facts sufficient for a jury to find that the assault was committed by this extra clerk Burdsall within the scope of his employment and in furtherance of appellee's business.

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STATUTES:

Title 45 U.S.C.A. (Federal Employers' Liability Act) secs. 51-60	2, 3, 4, 5, 6, 7, 8, 9
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STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee the question presented is: Whether appellant's opening statement, which alleged that, after the appellant crew clerk had out of necessity assigned one extra clerk to fill a job vacancy, Burdsall, another extra clerk employee of appellee, made a belated telephone call to claim this vacancy when he was advised by appellant that the vacancy was filled, engaged the appellant in a bitter argument concerning a violation of his (Burdsall's) rights under the appellee's rules to fill the job, demanded that he be allowed to immediately work as an extra employee in some other job where he was not needed, angrily hung up the telephone when his demand was refused, and about forty-five minutes after the telephone call walked into appellant's office "roaring mad" and assaulted appellant, set forth facts sufficient for a jury to find that the assault was committed by this extra clerk Burdsall within the scope of his employment and in furtherance of appellee's business.

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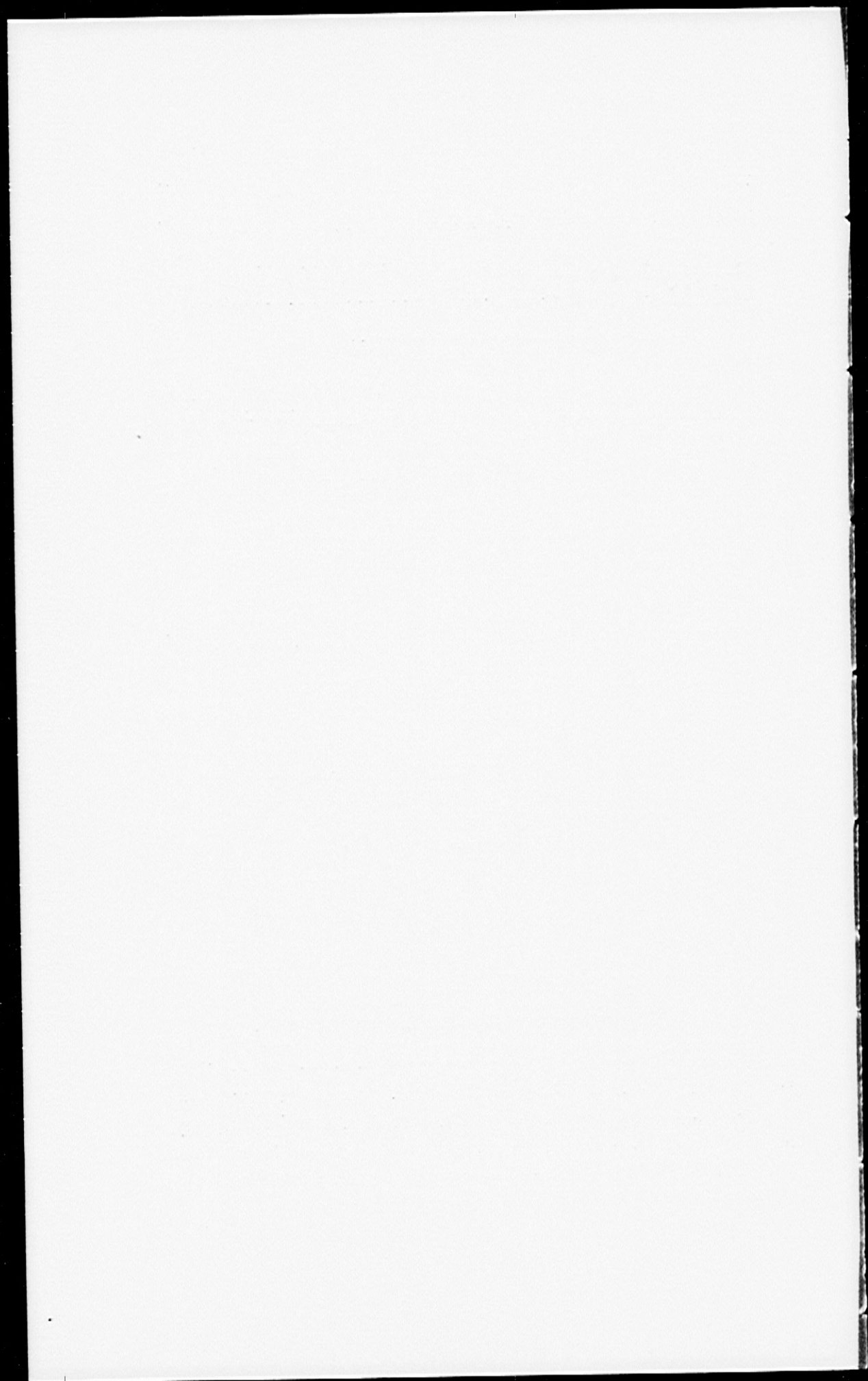
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,567

NOEL D. EURESTI, *Appellant*

v.

THE WASHINGTON TERMINAL COMPANY, a corporation,
Appellee

**Appeal from Judgment of the United States District Court for
the District of Columbia Entered in Favor of Appellee on
Appellee's Motion for Directed Verdict**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's opening statement to the jury promised that the evidence would show that on September 11, 1957, he was employed by appellee Washington Terminal Company as a crew clerk (J.A. 4-5). His job was to make certain that crews for the next (or midnight) shift were lined up,

assembled, and would report for duty (J.A. 5). On this particular date, appellant also had to assign someone to fill a yard clerk position on his own 4:00 p.m. to midnight shift (J.A. 7). Two clerks, Burdsall and Ryan, constituted an extra list, and were thus available to fill a vacancy in this yard clerk position (J.A. 6). With respect to this particular vacancy, Burdsall had first claim or priority (J.A. 7). However, inasmuch as he failed to make a timely assertion of this claim, appellant was required to assign Ryan to this vacancy (J.A. 7-8). Seven minutes after Ryan was given the assignment and sometime after 5:00 p.m., Burdsall telephoned to claim the job (J.A. 8). The appellant explained to Burdsall that he had, out of necessity, placed Ryan in the yard clerk vacancy (J.A. 8). A bitter telephone argument followed with the entire conversation revolving around appellant's violations of Burdsall's rights under the appellee's rules to fill the job (J.A. 8-9).

Burdsall then demanded that since he was denied the yard clerk vacancy, he be allowed to come in and work as an extra in appellant's office, although he was advised that there was no need of his services (J.A. 9). Upon this demand being refused, Burdsall angrily hung up the telephone (J.A. 9). About forty-five minutes after this telephone conversation, Burdsall, who was off duty, walked into the crew clerk's office "roaring mad," walked up to appellant, grabbed him, gave him "a punch in the face" and threw him over a chair (J.A. 9). As a result of this assault, appellant suffered a permanent scar on his lip, a bloody face, was hospitalized for a number of days and was out of work for about one month (J.A. 9-10).

SUMMARY OF ARGUMENT

Appellant crew clerk seeks to recover under the Federal Employers' Liability Act which provides that a carrier such as appellee is liable for injuries due to its negligence. While the term "negligence" embraces a wilful

assault and battery committed by a fellow employee, the appellee's negligence depends on whether the assault and battery were performed in the scope of Burdsall's employment and in furtherance of appellee's business.

The argument by the off-duty Burdsall about the violation of his rights to fill the vacancy he knew to be already filled was to serve only his own interests. His immediate demand that as an alternative he be allowed to work as an extra employee where he was not needed was not within the scope of his employment, and the assault he subsequently committed was in no way in the service of the appellee's business. Consequently, appellee is not guilty of any negligence and is therefore not liable to appellant.

ARGUMENT

Appellant Euresti contends that the assault committed against him was the outgrowth of the argument over appellee's regulation. Euresti further asserts that the assault arose out of a work matter.

But before Euresti would be entitled to recover for his injuries he would have to make an adequate showing that the assault was the result of appellee's negligence because it was committed within the scope of Burdsall's employment and in furtherance of appellee's business. As a railroad crew clerk, appellant's exclusive remedy is under the Federal Employers' Liability Act, 45 U.S.C.A., sec. 51, et seq. Under the terms of that Act, a common carrier, such as appellee, is liable only when the injuries complained of are "due to its negligence." *Id.* sec. 51. As the Supreme Court stated in *Wilkerson v. McCarthy*, 336 U.S. 53, at 61 (1949), the Act "does not make the railroad an absolute insurer against personal injury damages suffered by its employees. * * * the Act imposes liability only for negligent injuries."

As noted by appellant, the Supreme Court in *Jamison v. Encarnacion*, 281 U.S. 635 (1930) and *Alpha S. S. Corp. v.*

Cain, 281 U.S. 642 (1930), defined the term "negligence" as embracing a wilful assault and battery committed by a fellow employee. However, in the *Jamison* and *Cain* cases, supra, as in all cases decided under the Federal Employers' Liability Act, employer negligence depends upon whether the assault and battery were performed in the scope of the aggressor's employment and in furtherance of the employer's business.

Appellant's opening statement indicated only aggressor Burdsall's concern for his own personal interests and rights. In that statement appellant alleged that, after he out of necessity assigned an extra clerk to a vacancy, Burdsall, another extra clerk, made a belated telephone call to claim this vacancy, was told that it had been filled, engaged the appellant in a bitter argument over the telephone concerning claimed violation of his rights under appellee's rules to fill this job, and demanded that since he was denied this job he be allowed to work as an extra in appellant's office where he was not needed.

Evidence of these facts could prove only dissatisfaction with Burdsall's not being given a job. He had no concern for appellee in the argument, as the disputed vacancy had already been filled and he was advised accordingly. That Burdsall then demanded that he be allowed to work as an un-needed extra in another job is only additional evidence that his own concern was his sole concern. Upon this demand being refused, Burdsall angrily hung up the telephone and about forty-five minutes later walked into appellant's office "roaring mad" and assaulted him. These allegations of fact, even if proved, completely fail to show how or in what manner either the argument or assault was within the scope of Burdsall's employment.

The leading case under the Federal Employers' Liability Act on this question is that of *Davis v. Green*, 260 U.S. 349 (1922) where the plaintiff sought to recover damages for the death of her conductor husband. One of the defendant

carrier's engineers struck and disabled a switchman and then ran his engine onto a switch which was to have been thrown by the injured switchman. The conductor alighted from the train to throw the switch, as was his duty in such an emergency. The engineer then alighted, cursed the conductor because he had not thrown the switch, and shot him. The Supreme Court reversed the judgment for the plaintiff and held at pages 351-352 that:

"But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the Statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a willful act wholly outside the scope of his employment while his employment was going on * * *."

Just as was the plaintiff in *Davis*, Euresti here was the victim of a wanton and wilful assault done to satisfy only the temper or spite of the aggressor. Recovery was properly denied him by the District Court as it was to Green by the Supreme Court. Each court held that the assault was a wilful act wholly outside the scope of the aggressor's employment and that under the Federal Employers' Liability Act an employer is not liable for such an assault. That such is the law is evidenced in numerous other cases, all brought under the Federal Employers' Liability Act, among which are the following:

Sheaf v. Minneapolis, St. P. & S. S. M. R. Co. (8 Cir. 1947), 162 F. 2d 110, was an appeal following the trial court's dismissal of the complaint for failure to state a cause of action. The complaint alleged that at a stop, the plaintiff conductor was passing the engine and the engineer called to him, inquiring as to the reason for delay. As the

conductor was hard of hearing, he missed the ensuing conversation and therefore asked the engineer to alight in order to talk with him. The engineer, responding with "you goddam right I'll come down," alighted, and without provocation, assaulted the conductor. Although the complaint further alleged that the assault was made in the scope of the engineer's employment, the Eighth Circuit, in affirming the dismissal of the complaint, cited *Davis v. Green*, supra, and concluded that because at the time of the assault the aggressor was not acting within the scope of his employment nor for the purpose of furthering the business of the railroad, the defendant railroad could not be liable.

The case of *Young v. New York Cent. R. Co.* (Ohio 1949), 88 N.E. 2d 220, cert. den., 339 U.S. 986 (1950) was an action for damages under the Federal Employers' Liability Act where the court directed a verdict for the defendant at the close of all the evidence. The plaintiff was late in relieving a fellow employee from his tour of duty. When the plaintiff finally arrived on the job, the fellow employee told him to hurry, tugged at the plaintiff's jacket and stabbed him several times. The Ohio Court of Appeals affirmed the directed verdict on the grounds that "under the most liberal construction of the evidence the attack in question cannot be considered in furtherance of the employer's business." 88 N.E. 2d 225.

See also the following cases involving similar facts or following the same reasoning: *Atlanta & Charlotte Air Line R. Co. et al. v. Green*, 279 U.S. 821 (1929), reversing per curiam, 151 S.C. 1, 148 S.E. 633 (1928); *St. Louis-San Francisco Railway Co. v. Mills, Administratrix*, 271 U.S. 344 (1926); *Hoyt v. Thompson* (7 Cir. 1949), 174 F. 2d 284; *Lore v. B & O R. Co.* (1959), 190 N.Y. Supp. 2d 506; *Lavender v. Illinois Cent. R. Co.*, (Mo. 1949), 219 S.W. 2d 353, cert. den. 338 U.S. 822 (1949), rehearing denied, 338 U.S. 887 (1949); *Osment v. Pitcairn et al.* (Mo. 1941), 159

S.W. 2d 666, cert. den. for want of jurisdiction, 317 U.S. 587 (1942), 320 U.S. 792 (1943). See also *Park Transfer Co. v. Lumbermen's Mut. Casualty Co.* (D.C. Cir. 1944), 142 F. 2d 100 and *Grimes v. B. F. Saul Co.* (D.C. Cir. 1931), 60 App. D.C. 47, 47 F. 2d 409, where this court denied recovery as a matter of law for the same reason found in the foregoing cases decided under the Federal Employers' Liability Act, i.e., that the assault by the employee was not committed in the scope of his employment and to further the business of his employer.

Appellant has cited three cases in his brief decided under the Federal Employers' Liability Act. An examination of their facts shows that these cases in no way conflict with either the above-mentioned cases or the instant case.

Appellant's quotation from *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1956), while pertinent to the facts of that case, has not application here. Rogers, a section worker for the defendant railroad, was injured as the result of the defendant requiring him to burn weeds and spot hotboxes in a place where a passing train fanned flames which forced him to retreat and fall from the top of a culvert. Euresti seeks to recover under the doctrine of *respondent superior* and not, as Rogers did, for the carrier's failure to give him a safe place to work.

The case of *Spann v. Richmond Fredericksburg and Potomac Railroad Company* (D.C. Cir. 1959), U.S. App. D.C. , 273 F. 2d 827 was an action by an engineer for injuries resulting from the defendant carrier's failure to provide him with a safe place to alight from his locomotive over an inspection pit. Contrary to what appears to be appellant's contention, the *Spann* case did not involve an argument over the carrier's rules. In *Spann*, this court, at 273 F. 2d 829, quoting *Rogers*, supra, recognized that recovery under the Federal Employers' Liability Act was based on employer negligence. Euresti, unlike Spann, is not seeking to recover for his employer's failure to provide him with a safe place to work.

Gibson v. Kennedy (1947), 23 N.J. 150, 128 A. 2d 480, involved an assault by a conductor who, under instructions from his superiors, was enforcing the defendant's regulation against riding "dead head" when he sought to prevent the plaintiff, whom he thought to be an unauthorized person, from reboarding a train at a station stop.

But here, unlike in the *Gibson* case, there is no evidence that the aggressor was acting under instructions from appellee or enforcing appellee's rules for appellee's benefit. The aggressor Burdsall was off duty and he was fully advised that the vacancy had been filled. He was concerned solely for his own interests when he argued about *his* right to fill the vacancy and then as an alternative demanded that *he* be allowed to work as an unneeded extra in appellant's office.

It is the Federal Employers' Liability Act, *supra*, under which appellant must recover. And recovery under this statute is based on employer negligence, rather than absolute liability. *Wilkerson v. McCarthy, supra*. While abolishing or modifying the common law defenses previously available to an employer, this statute is not a workmen's compensation statute and still premises employee recovery on employer negligence. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507 (1956). Accordingly, the cases of *Leonbruno v. Champlain Silk Mills* (1920), 229 N.Y. 470, 128 N.E. 7 and *Hartford Accident and Indemnity Co. v. Cardillo* (D.C. Cir. 1940), 72 App. D.C. 62, 112 F. 2d 11, which are workmen's compensation cases, are inapposite here. Wholly without merit is appellant's use of the language and reasoning from these cases, and his attempt to equate the Federal Employers' Liability Act with a workmen's compensation act is in direct conflict with unequivocal and repeated statements by the Supreme Court. *Rogers v. Missouri Pacific R. Co.* and *Wilkerson v. McCarthy, supra*.

As has been noted above, appellee is liable only for negligence, which in this case, depends on whether Burdsall committed the assault in the scope of his employment and in furtherance of appellee's business. See *Davis v. Green*, supra, and the other cases decided under the Federal Employers' Liability Act hereinbefore cited. And as has also been noted above, Burdsall, who was off duty, made a belated telephone call for the vacancy, was advised that it was filled, argued about his rights to fill it, demanded that he be allowed to work as an extra in another position where he was not needed, and after this demand was refused, he assaulted appellant. In these actions, Burdsall was concerned only for himself. By these actions he evidenced no concern for or intention to serve appellee's business. His sole purpose was to suit his own demands and convenience, and when he failed to achieve this, he satisfied his enraged disappointment by assaulting appellant.

CONCLUSION

In view of the foregoing, the directed verdict and judgment entered for the appellee should be affirmed.

Respectfully submitted,

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